IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

Kurt Emil Bruno Molzahn,

Petitioner,

against

United States of America.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No opinion was rendered by the District Court except such as was expressed at various times in the course of the trial, and in the Court's charge, which is to be found on pp. 664-675 of the Record. An opinion was handed down by the Court of Appeals and it will be found in the Appendix to the Brief.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 347 of Title 28 of the United States Code, providing *inter alia* for writs of certiorari to Circuit Courts of Appeals.

Statement of the Case.

A statement of the facts is set forth in the petition and we shall endeavor in our argument to refer to the evi-

dence only as it is necessary to do so. The page references will be to the evidence as found in the printed Transcript of the Record.

Specification and Assigned Errors.

The assignments of error filed in the lower court will be found printed in the Appendix to this brief, and it is intended by the petitioner to press all assignments of error except Assignment No. 3. The assignments pressed raise the following issues:

1. The Court's admitting the alleged conversations which the witness Flatter said he had had with the petitioner on a trip to Europe in July, 1937.

2. The Court's permitting the witness Pelypenko to testify to the alleged conversations which he had with three of the self-confessed conspirators—Kunze, Vonsiatsky and Willumeit—at the Bismarck Hotel in Chicago on July 26, 1941.

3. The Court's permission to the defendant Willumeit to testify as to what Kunze said to Pelypenko at the Bismarck Hotel in Chicago on July 26, 1941.

4. The Court's admission of Exhibits 34 and 35, two letters alleged to have been writen by Kunze subsequent to the period of the conspiracy.

5. The Court's denial of the petitioner's motion for a directed verdict at the close of the Government's case.

6. The Court's denial of the motion for the petitioner at the conclusion of the trial for a directed verdict of not guilty.

7. The Court's denial of petitioner's motion to set aside the verdict and grant a new trial.

ARGUMENT.

POINT I.

The evidence was insufficient to support a finding that the petitioner knew of and participated in the conspiracy.

The indictment was drawn under Section 34 and subsection (a) of Section 32 of the United States Code, the applicable portions of which are quoted in the margin.[1]

The substance of the indictment is stated in the petition and the indictment itself will be found printed on pages IX to XIV of the Record.

In order to prove the conspiracy and the relation of the petitioner to it, the Government called twenty-one witnesses. Several of them described the activities on the part of Vonsiatsky from 1934 down to the latter part of 1941 in Connecticut and in other parts of the world, directed to rescuing Russia, his native land, from the Bolshevik government. There was testimony as to Vonsiatsky's meetings with Kunze and Willumeit in Chicago, and in particular a meeting on July 26, 1941. Willumeit was put

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[1] Sec. 32. *Unlawfully disclosing information affecting national defense.* Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: * * *

(The rest of the Section applies to offenses committed in time of war.)

Sec. 34. *Conspiracy to violate preceding sections.* If two or more persons conspire to violate the provisions of sections 32 or 33 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by section 88 of the Title 18. * * *

on the stand and described a journey he had made with Kunze through the West, visiting places where the United States had defense bases and where munitions were being manufactured. There was evidence showing acts and declarations of the defendants Ebell, Kunze and Willumeit at El Paso, Texas, subsequent to the July meeting. The story of the doings of the four other men in relation to the conspiracy was complete without any reference to Molzahn. He was not shown to have participated in any of their meetings or in anything that they did, nor was he shown to have met and talked to them or communicated with any of them, during the period covered by the indictment—January 1, 1941 to December 6, 1941.

Of the entire twenty-one witnesses called by the Government, there was only one who saw, talked to or in any way communicated with the petitioner during the period of the conspiracy. This was a man named Pelypenko, and upon his testimony the Government's case had to stand or fall. The man was a Ukrainian by birth. Originally a priest of the Russian Orthodox Church, he had become a Roman Catholic priest under special dispensation as to celibacy. From 1933 to 1937 he had lived in Germany, and in the latter year gone to Argentina to minister to his fellow Ukrainians in that country. He professed, in addition to being a cleric, that he was an ardent Ukrainian patriot, seeking to free his native land from the Bolsheviki. In the Argentine he worked at first for the German government. Later he left the employ of the Germans to work for the British and American Embassies, reporting to them on German activities. Then later, at the suggestion of the American Embassy, he came to the United States carrying with him a card which he had been given by Prince Schaumberg-Lippe of the German Embassy (p. 7), and notes of recommendation that he had obtained from the German authorities (p. 37). He arrived in the United States on March 24, 1941, and was met at the wharf by an F.B.I. agent named Fellner (p. 26). His

work was to run down German activities in this country, and he reported from time to time to Fellner. That he did so on an important matter connected with the case was shown by the testimony of an F.B.I. agent named Bucher who testified (p. 634) that he had received from Fellner the photostats of two letters introduced in evidence by the government. Pelypenko further in describing his method of work said he reported orally to the agents of the F.B.I., they making notes of what he told them. Fellner for some reason was never called to the stand. Pelypenko's expenses were paid by the Government, and he received from it no other compensation (p. 30). He said he was not interested in money; he worked for an ideal (p. 30). At the time of the trial he had been brought to Hartford from the Immigration Station at Fort Howard, Maryland, where he had been interned for a considerable period of time. His work for the Government in the present case was under-cover work—the work of an informer pretending to be in sympathy with the government of Germany.

Pelypenko first met the defendant Willumeit in Chicago in April, 1941, having been introduced to him by a fellow Ukrainian, and in May, 1941, he went to Philadelphia and called on the German Consul. He asked to become acquainted with people who were aiding the German propaganda, and he said the Consul told him that the petitioner was "one of our most important workers"—"one of the closest co-workers of the German Consulate." The Consul wrote down on a piece of paper petitioner's name and address, as well as that of Rev. Herman H. Koenes, a priest of the Roman Catholic Church (pp. 7-8; 383). We do not know whether Pelypenko called on Father Koenes, but he testified that he did call on the petitioner, and asked to be connected with the German Embassy in Washington (p. 8). Molzahn was reported to have said he was acquainted with a certain Baron Von Geinanth, but suggested that the connection with the German Embassy be

made through another worker, a Pastor Evers of Baltimore, and he gave him the address of this pastor. Molzahn wrote the name and address of Pastor Evers on a card and gave it to Pelypenko. Asked what else was said at the interviews, Pelypenko answered (p. 9), "I asked the pastor what he thought about the aid of the Ukrainians in the German aims."

> Q. What did he say? A. He said that the Ukrainian aid may be directed in three directions.
>
> Q. Anything else? A. First direction: propaganda against war and against the warring authorities in Washington. Secondly: to lead propaganda amongst Ukrainians concerning independence of the Ukraine. Thirdly: to give information about factories and military equipment.
>
> Q. By the way, what language did you and the defendant Molzahn use when you had this conversation? A. In German.
>
> Q. You speak German, do you, Father? A. Yes.
>
> Q. What else was said by the defendant Molzahn at that time, if anything? A. At that time we spoke very little, just about this."

Pelypenko went to Baltimore and called on Pastor Evers and told him of his visit to Molzahn, and Pastor Evers directed him to the German Consul in Baltimore, who in turn gave him a card with the address and telephone number on it of the German Embassy in Washington. He later called at the German Embassy in Washington and saw a man named Von Haydn, who was Secretary of the Embassy. Von Haydn later visited him at his hotel (p. 10).

There was no implication of criminality in the Consul's speaking of Molzahn as one of his best workers for Molzahn as a German Lutheran pastor ministered to many poor persons and was constantly applied to by persons who had recently come from Germany and who needed

work. It was only natural for him to keep in touch with the Consul and collaborate with him also in maintaining friendly relations between Germany and the United States. He was naturally for peace between the United States and Germany, and what was felt by many Americans at the time was felt intensely by him as a man who had come from Germany since the last war, whose parents were still alive in that country and who had many other relations there—he hoped and prayed that peace might be preserved. And when Pelypenko went to him, if the conversation occurred as the priest narrated it, it was natural that petitioner should have talked of "the aid to the Ukrainians in the German aims." There was nothing illegal in this in May, 1941, or that the aid might be given through propaganda "against war and the warring authorities in Washington," and the propaganda among the Ukrainians might well concern the independence of the Ukraine. What did he mean, however, when he spoke of giving information about factories and military equipment? The matter is stressed by Judge Hand in the opinion of the Court of Appeals. He argues that it meant that in May, 1941, the talk between the petitioner and Pelypenko bore upon information relating to our national defense, but the conversation was in broken German, and we do not know the actual words that were used. It was more than a year afterward that Pelypenko repeated it in court, and when he repeated it he spoke in his native Russian. The words had to be translated by an interpreter into English. If all that Pelypenko testified to as having been said by Molzahn was said and covered by the words "to give information about factories and military equipment," it was indeed a slender thread on which to hang an inference of Molzahn's guilt. The Government did not contend that petitioner entered the conspiracy in May. It did not then exist. Pelypenko had met Willumeit, but the meetings that he testified to with the other defendants in Chicago did not occur until July. The

conspiracy did not take shape until a meeting at the Bismarck Hotel on July 26, 1941.

Pelypenko returned to Chicago and had frequent interviews with Willumeit, finally being present at a meeting of Willumeit, Kunze and Vonsiatsky on July 26, 1941, already referred to. At that meeting, according to Pelypenko's testimony, Kunze suggested that Molzahn would help him in securing passport papers to be used by Kunze in getting into Mexico. Kunze stated, according to Pelypenko's testimony (p. 23) that if he (Pelypenko) would be an intermediary between Pastor Molzahn and himself in connection with getting a passport, he (Kunze) would be very thankful. He said that he would write a letter to Pastor Molzahn and tell him of this.

It is to be noted that all the conversations between Pelypenko and the conspirators in Chicago were in German, as had been the conversation Pelypenko said he had had with the petitioner.

Pelypenko said he went to New York, and later received a letter from Kunze in German. The letter was dated July 31, 1941, and the translation of it put in evidence reads as follows (p. 15):

> "Dear Comrade Reverend Pelypenko: Enclosed the best photograph that I could obtain so quickly. In the event it can't be used, I will send you a somewhat larger one, which, however, will require two more days. I have written to Pastor M. Again best of thanks for your help. We are all fighting for the liberation of our people. Heil. Yours, Wilhelm Kunze."

Pelypenko then went to Philadelphia and called at the office attached to Molzahn's church, but was told that Molzahn was not there. The person in the office gave him the address of the house next door to the church, and wrote down on a piece of paper, "Rev. K. E. B. Molzahn, 228 N. Franklin Street, Philadelphia, Pennsylvania." The man told Pelypenko that if he had anything he should send

it to that address. He said that the pastor was on his vacation and he could not give him his address, meaning presumably the place where he was at the time. Pelypenko, according to his testimony, left two small photographs of Kunze in an envelope with the man and asked him to send it to him (pp. 16 and 17).

Pelypenko returned to New York and went again to Philadelphia, this time carrying with him another letter which he had received from Kunze. It bore the date August 2, 1941, and read:

> "Dear Friend Reverend Pelypenko: Enclosed at last are the correct photographs. I hope that everything is going all right. Heartiest of greetings and thanks. Heil. Yours, Wilhelm Kunze." (p. 15)

In the second letter there were three photographs.

Pelykenko went to Philadelphia, again saw someone, according to his testimony, in Molzahn's office, and left two of the three photographs with him, Molzahn still being away from town. He returned to New York, and about six weeks afterwards went to Philadelphia for the third time, and then, according to his testimony, saw petitioner (p. 17). Pelypenko declared he then had a conversation with the pastor and the testimony of Pelypenko with regard to this conversation was the foundation of the Government's case. The testimony is in the record, but that the court may see it in full we here repeat it.

> "Q. After you received these two letters which have been admitted in evidence, Government's Exhibits 15 and 17 I believe they are, where did you go?
>
> A. After I received the first letter I went to see Pastor Molzahn in Philadelphia.
>
> Q. Did you have both of those letters, Government's Exhibits 15 and 17, with you when you went to see the defendant Molzahn in Philadelphia?
>
> A. Only one. When I received the first I immediately went to see Pastor Molzahn.

Q. Do you remember what day of what month it was when you went to Philadelphia?

A. I do not remember.

Q. Do you know whether it was in July or August?

A. Second or third of August.

Q. Did you go to the defendant Molzahn's home or to his office?

A. I rang the bell at his residence. No one answered. And then I went to his office.

Q. Did you find him at his office?

A. I found a certain person whose name I do not know. He was sitting there and writing. He told me that Pastor Molzahn was on his vacation at present.

Q. Did you leave anything at that place for the defendant Molzahn at that time?

A. I asked this person sitting there to give me an address. He told me he was not able to do so as per order by Pastor Molzahn.

Q. Did you leave anything with that man for the defendant Molzahn?

A. Then I left two small photographs in an envelope with him, photographs of Kunze, and asked him to send it to him.

Q. Were those the same photographs of the defendant Kunze that you received in the envelope which has been admitted as Government's Exhibit 15?

A. In the first letter.

Q. And you kept one of those pictures which you have identified here today; is that true?

A. No. There were only two, and I gave him both.

Q. I see. The picture which you have identified here today came in the other envelope; is that it?

A. That was in the other envelope.

Q. I see.

A. This person gave me his address and told me I can send anything I need to that address.

Q. To the defendant Molzahn's address?

A. Yes.

Q. I show you that piece of paper and ask you if you have ever seen it at any time.

A. He wrote this address for me and told me if I have anything I should send it to him.

Q. You don't know the name of this man?

A. No.

Q. But he was in the defendant Molzahn's office; is that it?

A. Yes, he was at the office.

MR. DODD:—We offer this.

(Government's Exhibit 19: Paper with address.)

MR. DODD:—May the record show this exhibit 19 bears the words 'Rev. K. E. B. Molzahn, 228 North Franklin Street, Philadelphia, Pennsylvania.'

Q. Did you make another visit to the defendant Molzahn's office?

A. In a few days I received another letter with other photographs, and I once again went to Philadelphia, because this man in the office said that possibly Pastor Molzahn will return by Saturday. I did not see the Pastor again. In that manner I left two photographs with him and I left one with myself.

Q. Sometime later on did you see the defendant Molzahn in Philadelphia at his office or home?

A. I saw him in approximately a month and a half.

Q. Now, when you saw him on this later date, did you have some conversation with him?

A. Yes.

Q. Where was that conversation held, again?

A. At his office.

Q. Tell us what was said by the defendant Molzahn at that time to you.

A. That he received a letter from Kunze and did what he could.

Q. Did he say anything about pictures?

A. I showed one letter from Kunze with his back address on it.

Q. Now, what did he say when you showed him that envelope from Kunze?

A. He tore this address off and told me to be careful with it.

Q. What did he say about Kunze, if anything, right then?

A. That Kunze was not very careful in this case. He said that Kunze was at his residence a few times. He is a good man, but he is not careful.

Q. Did he call him any particular name?

A. He called him a dunce.

Q. He called Kunze a dunce?

A. Because he wasn't careful.

Q. Did he say anything about these photographs that you had left?

A. At that time there was no conversation.

Q. At that time?

A. I just asked how I can communicate with Kunze.

Q. What did he say?

A. He gave me the address of Dr. Ebell in El Paso.

Q. The defendant Wolfgang Ebell.

A. Dr. Ebell.

Q. Anyway, did you make a written note that time of the address that the defendant Molzahn gave you as the address of Ebell in El Paso?

A. I tore a piece of paper off the desk there and wrote the address down.

Q. Is this the note you made at that time (handing to the witness)?

A. Yes, that is what I wrote. Up to this time I never heard of this name.

Q. You never heard of Ebell before?

A. No.

Government's Exhibit 20:

MR. DODD:—May the record show that Exhibit 20 bears the legend 'Dr. W. Ebell, 111 N. Mesa Street, El Paso, Texas.'

(Mr. Dodd handed Government's Exhibit to the jury.)

Q. Did you and Molzahn have any conversation about how Kunze would get out of the country?

A. I said that he expects to leave and Molzahn said, 'Yes, I know.'

Q. Was there any talk between you and Molzahn about what Kunze would take with him when he left the country?

A. I stated that this business was very important, because he has with him important papers, and he said, 'That I know.'

Q. Did you have any further conversation with the defendant Molzahn about the photographs?

A. I didn't speak to him, because other persons had been waiting for him and my talk with him was very short. In connection with this letter, Pastor Molzahn told me that in his correspondence with Baron Geinanth, he has had an unfavorable experience with the post office, because of the back address.

Q. Did you ever at any time talk with the defendant Molzahn about these photographs that you left?

A. No, I never spoke. I considered this business finished."

Surely this testimony did not show that Molzahn had knowledge of and participated in the conspiracy. Clearly, the needed evidence was lacking.

It will be seen that the one conversation as narrated by Pelypenko left to pure conjecture the question of what was meant by Molzahn's answers. There was no evidence that Molzahn knew of the purpose for which Kunze had his photographs taken, nor was there any evidence that

he saw the photographs or had them in his possession. Taking Pelypenko's statements at their face value, the photographs had only been left at Molzahn's office for him to see, and there was not a particle of evidence that he had ever seen them. If Pelypenko was to be believed, Molzahn had said "that he received the letter from Kunze and did what he could," but there was no evidence as to what he did. There was evidence that he stated that he had knowledge "that he (Kunze) expects to leave, that his business was important, and that he had important papers," but there is no evidence that Molzahn knew why Kunze was leaving, what his business was, or what the important papers were. Adding it all up, there was nothing in the conversation to show that Molzahn was in a conspiracy with anyone to violate the law.

It should be noted at this point that Judge Hand misread the testimony in a significant particular. The priest's testimony relative to the receipt by him of Ebell's address from Molzahn was to the effect that Molzahn had given him the address but that he, the priest, had written the address down—not Molzahn. So he produced in court as corroborating his own story a memorandum written by himself.

Judge Hand points out that the admissions by the petitioner were not made after the crime was completed, but in the course of the alleged conspiracy, and therefore did not have to be corroborated, and the Judge cites as authority for his conclusion the recent case of Warszower *v.* United States, 312 U. S. 342 (1941). In that case, as the Court may remember, it was pointed out that the rule requiring corroboration of confessions was based on the necessity for protecting the administration of the criminal law against errors in convictions based upon untrue confessions alone, and that where the admission of guilt was made prior to the crime the danger does not exist. Therefore the Court did say, speaking through Mr. Justice Reed, that such admissions do not need to be corroborated; but surely the Court would not apply this reasoning to the alleged admissions made by Molzahn.

No one would press the rule as far as that. Neither the Judge who presided at the trial nor the Circuit Court of Appeals took the position that without any corroboration at all the case could have been rightly submitted to the jury, and the question really raised by the case is whether or not there was substantial evidence that in any way corroborated the inferences to be drawn from the answers made by Molzahn to the question asked him by Pelypenko. We contend that there was no such substantial evidence.

The facts in the Warszower case were absolutely different. The defendant was indicted for the use of a passport for the purpose of entering the United States. The Government claimed that the passport had been secured through false statements with respect to the defendant's name, citizenship, and place of birth, and to establish that the man was not a citizen of the United States and that he had resided abroad the Government put in evidence the repeated statements of the defendant to the contrary. There was a manifest of a steamer which had arrived in Philadelphia as far back as March 27, 1914, which stated that a man named Welwel Warszower, who was proved to have been none other than the defendant, was a citizen of Russia, that he had never been in the United States before, and that he had been born in Russia. The Government also proved that in 1917 the defendant had registered for the draft under the name of William Weiner; that he had never applied for naturalization under his own name or the names of Weiner or Wiener, which he had on occasion used. And it proved that in 1936, when applying for a passport in the name of Robert William Wiener, he had submitted a certified transcript of an entry in the Atlantic City birth record that a person of that name was born there September 5, 1896, and at the trial the Government proved the entry to be a forgery. If ever there was a case in which there had been corroboration out of the defendant's own mouth, it was this Warszower case, and we therefore can fully bow to the

ruling of the court with respect to admissions made by defendants accused of crime without in any way yielding our contention that the evidence in the Molzahn case should not have been submitted to the jury on the bare admissions made by the defendant in his conversations with Pelypenko.

There was only one source through which Molzahn could have secured information relative to the conspiracy, and that was the letter Kunze was supposed to have sent him, and the contents of the letter were not before the jury at the close of the Government's case. Pelypenko's testimony did not cover the contents of the letter. What the letter did contain was brought out afterwards and in the evidence for the defense. There was nothing in the Government's evidence that showed the contents of the letter, and the judge should have directed a verdict of acquittal at the end of the Government's case. The defendant made the necessary motion but it was denied. An exception was allowed and the denial of the motion forms the subject of the petitioner's first Assignment of Error.

Errors of the Trial Court in Admitting Evidence Offered by the Government.

We shall take up these errors in the order that they occurred at the trial. They are the errors complained of in Assignments No. 5, Nos. 2 and 4 (which we shall consider together), and No. 6.

We do not press the error complained of in Assignment 3. At the trial objection was made to the admission of certain documents offered as credentials to show that Pelypenko was an ordained Catholic priest, but as we now see it the court's action in admitting the evidence was immaterial. It seemed to us at the time that if the man was a priest the Government was not justified in asking him to act a part and deceive, even law-breakers, as to the part he was playing. If on the other hand

he was not a priest, but an adventurer who pretended to be one, the jury ought to have known it. On looking into the matter further we came to the conclusion that the judge was right in admitting the documents in evidence, and in the Court of Appeals the matter was not pressed.

The Error Complained of in Assignment No. 5.

This was the error in admitting the alleged conversations which the witness Flatter said he had had with Molzahn on a trip to Europe in July, 1937, because the conversations which were alleged to have been had occurred about 4 years prior to the period of the conspiracy alleged in the indictment. The defendant objected to the evidence and excepted to the court's ruling (p. 62) and the conversations appear on pp. 63-73.

The evidence was offered by the Government for the purpose of showing Molzahn's "state of mind" in 1941. But the evidence was to conversations with Molzahn in 1937, when the feeling of a German born American citizen might well have been altogether different towards the Nazi government. Such a German born citizen might well have been in sympathy with the Nazis in 1937 and not in sympathy with them in 1941, after the abuses of the Nazi regime had increased, the invasion of Czecho-Slovakia and Austria had occurred, and worst of all, the utterly unjustifiable invasion of Poland. England did not go to war with Germany until 1939, and the whole international set-up in 1937 was different from what it was in 1941. Molzahn might well in 1937 have had an entirely different view of the Nazi government from what he had in 1941.

And what was the testimony of the man Flatter? He had seen Molzahn only on a voyage to Europe and did not know him otherwise. Assuming the conversations were true, assuming that while on shipboard Molzahn had worn a Nazi button in 1937 and expressed sympathy with the Nazi party, it was a far cry to argue that he would for this reason have gone into a conspiracy to

injure the United States government in 1941. True, he had a brother-in-law, Dr. Behrensmann, living at Altona near Berlin, and through a subsequent witness whose testimony was introduced by the Government, a man named Kempner, a professor at the University of Pennsylvania, it was shown that Dr. Behrensmann was a leading field officer of the German police—the Gestapo (p. 87). Even so, it was no proof that Molzahn four years afterwards would have committed the crime charged against him by the Government.

Furthermore, we submit that the evidence was offered by the Government not to show intent, but rather "state of mind," which is something quite different, and that unless the Government was prepared to show some definite act on the part of Molzahn, the evidence as bearing upon the man's "state of mind" had no probative value whatever. Molzahn was not accused of having a "state of mind" but of participating in a conspiracy. The use of the evidence by the Government to prove participation in the conspiracy was like an attempt to hang a picture on a wall without a hook to hang it on. The picture would of course fall to the ground, there being nothing to hold it up. And so in the present case no act had been proved on the part of Molzahn to sustain the charges against him. The Government in seeking to introduce the defendant's conversations with Flatter relied upon the cases that had arisen under the Espionage Acts of 1917 and 1918 where the courts had allowed with great latitude statements made by the defendant before or after the statement on which the man was prosecuted. Had it been the man's intent to interfere with enlistment or recruiting, or to create insubordination in the land or naval forces of the Government? To prove his intent it was proper to show what he had said or written on other occasions. In these cases, however, the man had spoken or written something on account of which he was being prosecuted, and within certain limits it was admissible to prove prior or subsequent statements in order to prove

intent. In the present case, however, there was no proof of anything that had been done or said by Molzahn, and what he had said on the prior occasion was clearly offered in evidence to show that there was a likelihood that he would later have participated in the conspiracy. The decisions relied on by the Government were therefore inapplicable, and even if the conversations had occurred later than 1937 there would have been good reason for excluding the evidence.

The Errors complained of in Assignments 2 and 4.

These errors may be considered together.

The error complained of in Assignment 2 was that of the trial judge in permitting the witness Pelypenko to testify to alleged conversations which he said he had had with three of the conspirators, Kunze, Vonsiatsky, and Willumeit, at the Bismarck Hotel in Chicago on July 26th, the conversations being hearsay as to the defendant and there being no proof that up to the date mentioned, Kunze, Vonsiatsky and Willumeit had formed or been engaged in the conspiracy, or that Molzahn knew of it and was participating therein.

The error complained of in Assignment 4 was that the court permitted the witness Willumeit to testify to what Kunze said to Pelypenko concerning Molzahn at the Bismarck Hotel in Chicago on July 26, 1941. The testimony objected to was as follows:

> "Q. What did Kunze say to Father Pelypenko about the defendant Molzahn at this meeting?
>
> "Q. Will you answer that question, doctor? A. Mr. Kunze told Father Pelypenko that he was going to forward the passport pictures either to him or to Pastor Molzahn, that he was going to write to Pastor Molzahn that he wanted Pelypenko to meet Pastor Molzahn personally, and that Pastor Molzahn would take care of everything." (P. 95.)

Although Willumeit was one of the actual conspirators, and not an informer as was Pelypenko, the assignments made will be considered together, the action of the trial court in admitting the testimony having been erroneous in the main, as we contend, for the same reasons.

The conversations complained of appear on pages 10 to 12 and on pages 23 and 95 of the Record. The exceptions taken to the evidence are noted on pages 12 and 94.

The conversations, as we have said, were held at the Hotel Bismarck in Chicago on July 26, 1941. Vonsiatsky, Willumeit, Kunze and Pelypenko were present. Molzahn not only was not present but he had no knowledge of the meeting whatever. So far as the Record discloses, he was at his home in Philadelphia or on a vacation in the vicinity. Nevertheless, the conversations were offered in evidence as against him to show his connection with the conspiracy.

In Kuhn *v.* United States, 26 F. (2d) 463 (1928), C. C. A. 9th Circuit, the court said:

> "Giving the rules of evidence in conspiracy the widest reasonable latitude, we are aware of no principle under which the declaration of one conspirator to another is competent to establish the connection of a third person with the conspiracy."

In the recent case of Glasser *v.* United States, 315 U. S. 60-74 (1942), the Supreme Court, speaking through Hon. Justice Murphy, reaffirmed the rule laid down in the Logan case and pointed out that such declarations "are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. Minner *v.* United States, 10 Cir. 57 F. 2d 506; and see Nudd *v* Burrows, 91 U. S. 426, 23 L. Ed. 286. Otherwise heresay would lift itself of its own bootstraps to the level of competent evidence."

We submit that the trial judge ought not to have admitted the evidence in question.

The Errors Complained of in Assignment No. 4.

The error here, as we submit, was in admitting in evidence over the defendant's objection photostatic copies of two letters alleged to have been written and signed by Kunze in Mexico on December 8, 1941, the day after Pearl Harbor and after the alleged conspiracy had ended. We urged that the date of these letters made them inadmissible.

The rule was laid down in the leading case of Logan *v.* U. S., 144 U. S. 263; 36 L. Ed. 429 (1891), as follows:

> "Doubtless in all cases of conspiracy the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. U. S. *v.* Gooding, 25 U. S. 12 Wheat 460, 469. But only those acts and declarations are admissible under this rule which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or by failure, the admissions of one conspirator, by way of narrative of past facts, are not admissible as evidence against the others."

Logan *v.* U. S. has been followed in a great number of cases, among the more recent of which is U. S. *v.* Groves, 112 F. (2d) 87 (C. C. A. 2d Cir. 1941).

In Gambino *v.* United States, 108 F. (2d) 140 (C. C. A. 3rd Cir.) 1939, the court said:

> "If the agency is terminated or the conspiracy is over there is no longer any authority in the agent to act on behalf of his principal or of the accomplice to act on behalf of his co-conspirators. This is part of the substantive law of evidence. The error in treating such assertions as part of the *res gestae* was discussed

by Thayer in XV American Law Review 80. It, therefore follows that assertions made by an accomplice after the termination of the conspiracy come within the prohibition of the hearsay rule and are inadmissible. Many years ago the Supreme Court so ruled in Logan *v.* United States, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429."

According to the witness Myers (p. 111), an F.B.I. agent assigned to El Paso, Texas, the originals of the two letters we are now discussing had come to him about December 10th or 11th "from a confidential source" (p. 112)—presumably intercepted in the mail. Marked for identification when Myers was on the stand, the photostatic copies were later put in evidence by the Government just before the close of its case (pp. 145-147). The letters were in German, and translations of them were read to the jury. The first letter did not concern Molzahn in any way, but the second, unexplained, was greatly prejudicial to the defendant, for it had in it a reference to "Kurt" which the jury would have every reason to believe meant Kurt Molzahn, the defendant. Both letters were in longhand, and the writing was proved to be that of Kunze. The second letter was offered by the Government without the note or postscript at the foot of it. The first of the two letters, as translated, read as follows:

"Mexico, December 8, 1941.

"My dear Anastase Andreavich:

"Roosevelt finally has what he thinks he wants, but before long he will have it 'in the neck.' If the Japanese war had waited a few weeks more I would have been in Japan. As it is, I shall have gone on in another direction by the time this letter reaches you.

"The Atlantic crossing by air which I originally had in mind would cost $2600 more than I have now

and would require months of waiting. Another method of travel, the only one left open, will require about $1000 more than I have.

"There can be no going back for me any more, and the farther away I go the more difficult it will become to send me money. Please send what you can to: Dr. Wolfgang Ebell, 111 Mesa, El Paso, Texas. He is my very good friend, and I have asked him to forward money or mail intended for me to another address. Now, please do not use my name on money orders or letters, but only his. Do not write much, as his mail is censored.

"I am being very careful with my money and still have about two thirds of the travel-sum I originally took along. I shall certainly save what I can for you of whatever money you send me.

"Dove strechiv Mosquirer slawa Ronjir. H.H.

"Yours,

WILHELM GERHARDAVICH."

This letter, as will be seen, was an appeal to Vonsiatsky for more money—money needed by Kunze for his expenses in Mexico and his leaving that country.

The second letter presumably had been enclosed in the same envelope with the first, for it was signed by Kunze and the date was the same as that of the first letter, and "Mexico" was in the place line. As translated, it began, "My dear Ferdinand and Wolf." Who the "Ferdinand" was did not appear, but counsel for the Government, in reading the translation, made it clear that by "Wolf" was intended Wolfgang Ebell, the conspirator named in the indictment who lived at El Paso, Texas. The letter contained directions as to how the other letter should be forwarded to Vonsiatsky and how, if an answer came from him, it should be handled so as to reach Kunze.

The purpose of introducing the second letter was clearly to show Molzahn's connection with the conspiracy, as,

unexplained, it showed that he had allowed himself to be used as a forwarder of mail between Kunze and Vonsiatsky, two of the conspirators. The implication could not be denied.

As a matter of fact, hundreds of friends of the pastor were greatly disturbed by the letter when they saw it mentioned in the newspaper accounts of the trial. It seemed to clinch the case and show that Molzahn was guilty of having been a go-between. This must have been the effect produced on the jury when counsel read to them the translation of the letter. Quoting from the record, this is how he read it:

> "Now, I will read for your attention Government's Exhibit 35, which has been admitted in evidence as a full exhibit. This letter is written in German. It likewise is dated December 8, 1941, and it bears the place line 'Mexico.'
>
> " 'My dear Ferdinand and Wolf,' and I recall again to your attention that Wolfgang is the first name of the defendant Ebell. 'The best of thanks for your friendly postcard. Rosenfeld has his war at last. It will cost him his head. The sudden outbreak of war has prevented my trip to Japan and it will be smart for me to keep going. Please forward the enclosed letter'—the letter I just read you—'from El Paso on by air mail after you have read it, and if desired, change the address, W.E. 111 N. (Mesa) but please be careful in taking the letter over the border. Should you get a reply, then send mail or money from Jaurez to Kurt, per his name'—Kurt is the name mentioned here. 'He will then forward the things.
>
> " 'I have not yet noticed whether the Yankee authorities even know that I am out of the country, but caution is necessary. In the meantime, many Christmas greetings and best wishes to you and your family. Many, many thanks for your friendly help. Heil Hitler. Yours, Wilhelm Kunze.

"'This enclosed letter goes to Anastase A. Vonsiatsky, Thompson, Connecticut'."

It will be seen that counsel for the Government went out of his way to stress the name "Kurt." It will be seen that when he came to the passage, "Should you get a reply, then send mail or money from Juarez to Kurt, per his name," he paused to say, "Kurt is the name mentioned here," and then, renewing his reading of the letter, continued with the words, "He will then forward the things." This pointed reference to a "Kurt" clearly informed the jury that the man referred to was the Kurt Molzahn of the case. He was the man who would receive the money from Vonsiatsky and forward it to Mexico. The letter must have convinced the jury that Molzahn had allowed himself to be used as a "letter box" for the conspirators for the letter clinched the matter, and there was only one meaning to be drawn from it. Molzahn was guilty. He had taken part in the conspiracy. Although the letter had been written after the period of the conspiracy, it had been admitted by the judge as evidence in the case, and that seemed to settle the matter. Twelve days later, at the close of the defendant's case, the reference to "Kurt" was specifically explained, but for the time being there was nothing to be done but submit to the Judge's ruling in admitting the evidence.

The Evidence for the Defense.

We did not in the Court of Appeals go fully into the evidence for the defense, as we felt it was not properly before the Court, it being for the Court of Appeals to determine only whether there was sufficient evidence to go to the jury on the question of the defendant's participation in the conspiracy. His Honor Judge Hand, however, has accepted what he thinks was evidence of the defendant's guilt outside of the testimony of Pelypenko, and in so doing has made nothing of the mass of evidence which

showed the contrary, and to which the attention of the Court should be drawn, if only to do justice to our client.

A large number of responsible persons who had been asked by us to come to Hartford from Philadelphia, Molzahn's home city, testified in his favor, and they spoke from a background of long intercourse with Molzahn, in most cases from month to month and year to year since he had come to this country from Germany. One, a Judge of the State Court of Common Pleas for the County in which Johnstown is situated, had become acquainted with him when he came to this country and was called to Johnstown as pastor of the local Lutheran church. He had served as pastor of the church from 1924 until 1929, when he was called to the pastorate of Old Zion in Philadelphia. This Judge of the Common Pleas Court, Hon. Charles C. Greer, spoke in the highest terms of the defendant and of his loyalty to the United States. He was the first of the witnesses called by the defense, and all of them testified to Molzahn's sincerity, his generosity of character, his devotion to his calling as a minister, and his unquestioned loyalty to the United States Government. He was the last person in the world to have entered into a conspiracy to injure our nation for the benefit of other governments.

We had opposed the introduction of the witness Flatter's testimony on the ground that the evidence of the defendant's "state of mind" was too remote, the evidence, if true, showing "state of mind" full four years before the year of the conspiracy, but the Court admitted the evidence, and it was therefore for us to combat it. Molzahn did remember having met the man, but his conversations with him were entirely different from those narrated by the witness. The pastor very definitely had not worn a Nazi button on the voyage or shown a sympathy with the Nazi government. The steward had told him that he was having difficulties with Mr. Flatter and did not seem to be able to please him. Would he not speak to Mr.

Flatter? He had done so, and with the kindest intentions given him a card to Dr. Behrensmann, a brother of Mrs. Molzahn, who was adviser to the government police at Altona, near Berlin. Flatter had told Molzahn that he had been persecuted by the Nazis and Molzahn thought that he could help him. Molzahn himself was in no way connected with the Nazi party, but it happened that he knew Dr. Behrensmann and that he might help him. The construction put upon this act of kindness was entirely unwarranted by Flatter, who seemed in some way to have got the idea that Molzahn was himself a creature of the Nazi government.

As respects the other evidence of "state of mind," the books, pamphlets and other things found in Molzahn's house, there was nothing in this to show Molzahn's sympathy with the Nazis, unless the mere having the things in his possession, which any educated man of German birth might have had, proved his disloyalty to our country. It was inconceivable that a man who had been guilty of entering into such a conspiracy as was charged in the indictment would have not destroyed the things long before. He would not have waited for the F.B.I. men to pounce upon him and the fact that he had the things in his house was evidence of his innocence rather than his guilt.

Molzahn had never been connected with the Bund. He had for a time subscribed to its publications, for he wanted to know about it, but becoming disgusted with it he had not kept up his nominal subscription. He had always opposed meetings of it or other German societies in his church, and when asked by a German society for leave to hold such a meeting, he had laid down a threefold rule: that only the flag of the United States, the Red Cross flag or the flag of the church should be displayed, that there should be no men in uniform at the service, and finally that the only speakers should be ordained ministers of the church. These conditions did not find favor with

the particular society and the matter was not pressed. As showing his opposition to the Bund, he had gone so far as to ask a member of his vestry to resign because of membership in it. This was testified to by the witness Kaupp (p. 269), who said that Molzahn had urged him to continue his work as vestryman and had given as a special reason for his doing so that he (Molzahn) had been obliged to ask another vestryman to resign because of his membership in the Bund.

Actions speak louder than words, and Molzahn's anti-Nazi attitude was well shown in one in particular. From the first he had been liberal and generous towards Germans of the Jewish race. When he had left his parish at Johnstown for a few months' visit to Europe to see his parents, he had recommended as a person to fill his pulpit a half-Jew whom he had known in Germany as a student, and who had recently come from that country. The Sister attached to Old Zion Church—it is the practice of Lutherans to employ nuns, known as Sisters, in their churches—was of Jewish parents, and had Jewish relations in this country. When asked to help young men of Jewish birth studying for the ministry in this country, he had gladly cooperated and helped one young man, even to the extent of assisting him with money (p. 187). Rudolph Rosenheimer, an insurance man living in Philadelphia, a Jew, was one of Molzahn's devoted friends, and testified to his long friendship with the pastor, expressing not only his admiration for him but a firm belief in his loyalty to this country. He had been at a meeting in one of the principal synagogues of Philadelphia where a Rabbi from New York and Molzahn had both spoken, and he had been for years a member of a small luncheon club at a meeting of which Molzahn had protested upon one of the members calling attention to his (Rosenheimer's) presence as a Jew. Most interesting of all was Molzahn's long friendship for a man named Waldemar Alfredo. Originally an actor in Germany, he had come to this

country in 1912 and been naturalized in 1924. He ran a restaurant in Philadelphia known as Alfredo's Theatre Cafe, and his parents were Jews in Germany. Molzahn had known him for many years and gone to his restaurant, and sent poor people there who were in need of food. Alfredo really loved the defendant, and had had a child christened by him. The Nazis had come to his restaurant, he said, and wanted to sing their songs there, so he put them out, and they started a boycott against the place. He had later left Philadelphia, and curiously enough gone to Connecticut to support himself, and when he heard of Molzahn's prosecution and of the trial that was going on in Hartford, he wrote to Molzahn expressing his sympathy and hoping that all would come out right. We asked him to appear as a witness for the defendant, and in this way Molzahn had the benefit of his testimony. He remembered the meeting at the synagogue in Philadelphia when Rabbi Malina came there from New York, and he explained that the meeting was for Jewish Relief in this country. Pastor Molzahn had spoken at the synagogue and said that the Jewish people in Germany were "treated wrong" and that he felt that Germany "was very sick, very sick," but he was sure the country would come to itself again. The man did not speak good English, but this was his recollection of what Molzahn had said at the meeting in the synagogue, at which there were some 200 people present, representing all faiths. When at another time the witness had gone on an invitation to Molzahn's church to attend an evening sociable, and some of the visitors had told him what a "nerve" he had to come there, he explained the situation to Pastor Molzahn and Molzahn had taken his part and brought him to the guest table (p. 369). Indeed, there are few Christian pastors who could show such a fine record as Molzahn's in their treatment of the Jews.

Judge Hand refers to Molzahn's association with a man named Kessemeier, as showing his Nazi sympathies,

but what were the facts as shown in the testimony? Kessemeier, an avowed Nazi, was the agent of the North German Lloyd Company in Philadelphia. Molzahn of course knew him and had gone to him for steamship tickets when he and his wife went to Germany. In 1934, Molzahn had gone on a cruise got up by the steamship company to the West Indies, and been asked by Kessemeier to be chaplain of the party. Naturally he had accepted, his personal expenses being paid by the Company. In 1937, when Molzahn went to Europe with his wife, he bought his ticket through Kessemeier. There was nothing wrong in this, it was only the natural way for him to go to Germany, and on this occasion he had paid his own expenses and those of his wife. The friendship with Kessemeier had however cooled, and there was a reason for the cooling. Kessemeier had a daughter married to a half-Jew in Germany, and Molzahn had befriended the young couple, although Kessemeier had opposed the marriage of his daughter. Molzahn had hunted up the son-in-law in Germany and actually helped him to the extent of giving him a small sum of money. Later, $50 was returned to him by Kessemeier, and the Government made much point of this as showing that the relations between Molzahn and Kessemeier must at the time have been friendly, but it was plain from Molzahn's testimony and that of his wife that his relations with Kessemeier had distinctly cooled, and according to Mrs. Molzahn it was Kessemeier's Naziism that had caused the cooling. Surely under these circumstances, to hold up Molzahn's intercourse with Kessemeier as a reason for thinking that he would have gone into the conspiracy was hardly a fair inference.

Molzahn gave an entirely different account of his interview with Pelypenko (see pp. 442-446). His sexton had told him that the priest had called and tried to see him while he was away. The priest called again, and the sexton brought him in. Molzahn "was polite to him and

very friendly." He offered him a seat on the other side of the table at which he was sitting. He was surprised that a priest in clerical garb should come to see him. Pelypenko spoke in broken German, and as the conversation progressed Molzahn could not get it clear what the man wanted, although he did speak about the Ukraine and Russia and Poland. Molzahn asked him why, if he needed help, he did not go to his own church. The man gave him no clear answer. He had with him quite a bundle of papers which he took out of his cassock, and he showed Molzahn an envelope, and mentioned the name "Kunze" whom Molzahn knew to be active in the Bund. He did not say anything about Kunze, but when Molzahn heard the name Kunze, that was enough for him. The man held out an envelope in front of him, and Molzahn saw on the back of the envelope his address. He tore the flap off the envelope and told the priest "in all friendliness and determination, to tell Mr. Kunze if he had a chance not to use" his "return address any more" (p. 444). He tore off the flap and handed the envelope back to the priest without reading the letter. Molzahn remembered the incident, naturally enough, and later spoke of it to others. Kunze's father was organist at another Lutheran church in Philadelphia, and as Mr. Schlick, the pastor of the church, was known to Molzahn, Molzahn spoke to him in regard to the matter and asked him to speak to the elder Kunze. Pastor Schlick said that it made the old man sick to refer to his son, he was so utterly opposed to his son's activities. Later, Molzahn spoke to Kunze Sr. about the matter, and then the thing was dropped. Molzahn saw a large number of persons who came to his sacristy from day to day, and having no special reason to remember the incident until examined before the Grand Jury in May, 1942, it is not surprising that the details went out of his memory. He could not remember more than one interview with the priest, although we examined him closely on the subject, and his

only recollection of the interview was as he stated on the stand. It was a flat denial of the priest's testimony.

Towards the end of the evidence for the defense a request was made by counsel to interview Kunze, Willumeit and Ebell, who having pleaded guilty were in the custody of the Government. We asked the Special Assistant Attorney General for leave to question them, but the request was refused, and an order of court was applied for. The Court considered the matter over night, and on the following day decided that counsel for the defense might examine the men, the examination being made behind closed doors, with only the men themselves and their counsel and the court stenographer being present to take down what they said in answer to the questions asked them by counsel.

It was an interesting moment when Kunze was examined. Would he say that Molzahn knew about the conspiracy, and what would he say about the letter he had written to Molzahn?

He answered the questions asked him by counsel at the meeting allowed by the court. And then there was even a more interesting moment—what promised to be a turning-point in the case—when later Kunze and Ebell were produced in court, in obedience to the judge's order, and in a crowded courtroom gave their testimony, being first examined by counsel for the defense and later cross examined by the Special Assistant Attorney General. Asked about Molzahn's alleged part in the conspiracy, their testimony, if taken to be true, completely exonerated him (pp. 555 to 566, 602 to 605, and 607 to 614). Kunze was directly asked as to the letter which he wrote Molzahn, and he testified that it was merely one of introduction, paving the way for Pelypenko to visit Molzahn but saying nothing about the conspiracy. So then, if Kunze was to be believed, it was immaterial whether or not Molzahn had received the letter. Pelypenko had not informed him

of the conspiracy, and if Kunze's letter had not done so, the bottom dropped out of the Government's case. Kunze was fiercely cross examined by the Government's attorney in the effort to show that he had made a different statement to representatives of the Government, but Kunze stood his ground and would not hedge, although in testifying as he had done he ran the risk of angering the Government. Both he and Ebell had not yet been sentenced, and it was a fair assumption that what they said, if it did not make out a case against Molzahn would not be to the satisfaction of the Government.*

POINT II.

As the Verdict of the Jury was Based Upon the Action of an Informer Employed by the Government in an Effort to Secure the Commission of Crime by an Otherwise Law-Abiding Citizen, the Judgment of the District Court in Sentencing the Defendant was Contrary to Public Policy and Should have been Reversed by the Court of Appeals.

At the time of the trial there was considerable discussion relative to entrapment, the matter first coming up when the defendant objected to Willumiet's testifying to what Kunze said to Father Pelypenko at the meeting on July 26, 1941. The question was then raised as to whether a Government agent who himself takes part in a conspiracy can testify as to statements made by the conspirators. The Record has it (p. 92) that counsel argued that there was evidence that Pelypenko, as Government agent, brought Kunze into the conspiracy. If counsel did say "Kunze" instead of Molzahn, it was a slip of the tongue, because there was not the slightest evidence that Kunze was brought into the conspiracy by Pelypenko. Counsel's argument was that Molzahn was brought into the conspiracy by Pelypenko, and this was what counsel intended to say, counsel arguing that as it

* Through Kunze we were also able at the close of the case to put in evidence the postscript note at the bottom of the "Ferdinand and Wolf" letter, which the government had not put in evidence with the letter. It showed that the "Kurt" of the letter was not Molzahn, but a certain Kurt Tuermer of Mexico City. See pp. 604 and 605 of the Record.

was an informer and not a co-conspirator who had taken part in the meeting, the rule that the statement of one conspirator is binding on the others in a conspiracy did not apply to the case, and the testimony should not be admitted. And in addition to the fact that the conspiracy was not otherwise proved, we argued that the principle of entrapment should be invoked, because the Government was basing its case on evidence which showed that Molzahn was brought into the conspiracy through Pelypenko. Counsel for the defense contended that at the time of the conversation Molzahn was an innocent man, not engaged in anything illegal. According to Pelypenko, the Government agent, he had visited Molzahn in May after getting the latter's name from the German Consul in Philadelphia, so that it was a fair inference that it was Pelypenko and not Molzahn who took the initiative. Pelypenko's visit as a Government agent to Molzahn was not to disclose criminal conduct already perpetrated by Molzahn, but rather to lead him into such conduct and entrap him (page 93).

At the close of the case, Mr. Coleman, of counsel for the defense, specifically referred to the argument that had been made in the course of the proceedings as respects entrapment. He did this in moving for a directed verdict of acquittal. He used the following language (pp. 662-663):

> "Your Honor, at this time at the close of all the evidence we ask that a verdict be directed for the defendant on all the evidence. Specifically we refer, your Honor, to the argument made at an earlier stage in the proceedings by Mr. Kane on the entrapment phase as seeming to us to raise a question of law which would require a directed verdict on all the evidence.
>
> "We further make a claim that no proof by competent evidence of a conspiracy as alleged in the indictment and amplified by the bill of particulars

has been made out, and for that additional reason we request your Honor to direct a verdict at this time for the defendant.

"THE COURT:—The motion is denied. Exception may be noted."

The argument was that the priest Pelypenko was a Government informer; that his visits to Molzahn at the time he said he left the photostats were directed to inducing Molzahn to assist Kunze in the carrying on of the conspiracy; and that the priest's return later in order to secure an interview with the defendant was for no other purpose than that of trapping him into the conspiracy. We were certainly correct in this interpretation of the priest's activities. Whether or not the evidence showed an actual entrapment, it showed an attempt to entrap by an employee of the Government. The Government agents sought to hook Molzahn into a conspiracy with which, so far as the evidence discloses, he had had nothing to do (pp. 93, 94).

Throughout the trial and until the case went to the jury, counsel for the defense argued that there was no evidence that Molzahn had really done anything to make him guilty as a conspirator, but the case was submitted to the jury and they found him guilty. They could have based their verdict only on the theory that Molzahn had done something to make him guilty. An attempt to entrap had been proved.

Pelypenko acted as an *agent provocateur*—he was no mere informer. He had cooperated with Kunze in seeking to bring about the commission of crime by an otherwise innocent man, and this should have been reason enough for the judge to refuse to submit the case to the jury. The court should have ruled that under the evidence disclosed it could not allow its process to be used to convict and punish an innocent man.

We are not unmindful of Pelypenko's interview with

Molzahn in May, when he talked with him about the "aid of the Ukrainians in the German aims," and Molzahn, according to Pelypenko, said that the aid might be directed in part to "giving information "about factories and military equipment." But these isolated words contained no substantial evidence that Molzahn was violating the law, and to argue from them that he had in mind a subsequent violation of the law was to hang the case upon a very slender thread. Therefore we cannot agree with Judge Hand, who says in his opinion that the fact that in May Molzahn advised Pelypenko to help German aims by giving information about factories and military equipment shows a direct interest in German espionage activities (see Opinion, p. 699). Even if the words did show a direct interest in German espionage activities in May 1941, it was a far cry to September, when the priest said he had his second interview with the defendant. There was, we repeat, no substantial evidence that Molzahn was breaking the law in the previous meeting. He was then an innocent man—entirely innocent of the charge subsequently brought against him. The conspiracy was not actually formed until July 26, 1941, and it was then that Pelypenko, true *agent provocateur* as he was, entered into the arrangement with Kunze to bring Molzahn into the conspiracy. Pelypenko's testimony, as well as that of Willumeit, was to the effect that the idea of bringing Molzahn into the game arose with Kunze, and perhaps this was true, although it is hardly likely that Kunze hit upon the idea of bringing Molzahn in when there were other Lutheran ministers in Philadelphia and elsewhere, who might as well have been asked to help him. It is far more likely that Pelypenko, who had seen Molzahn in May, suggested him. But whether he did or not, whether he thought of bringing Molzahn in arose in Pelypenko's fertile mind, or in the mind of Kunze, it matters not as respects the law of entrapment, for Pelypenko in every sense cooperated with Kunze to bring in the

pastor. The photographs were sent to Pelypenko in New York, not to Molzahn, and, if he was to be believed, he took them to Philadelphia for Molzahn to use. Twice he went to Philadelphia with the photographs, and according to his testimony left a part of them for Molzahn at his office. Finally, on his third visit to Philadelphia, he claims that he saw Molzahn, and this was of course to get him to make admissions that the Government might afterwards use against him.

We have the greatest respect for Judge Hand—he indeed stands high on the list of distinguished Federal judges—but he does not seem to realize the iniquity of the thing. Pelypenko, an employee of the Department of Justice, was reporting, as we have said, to Fellner, the agent of the Department who had met him on the wharf when he arrived from Buenos Aires. But whether or not he was being followed up by a representative of the Department, the Government was responsible for what he did. If he went over the line of what was right and proper and provoked the commission of a crime, the Government agents cannot later excuse themselves by saying that they did not know what he was doing.

The attorney for the Government, whoever it was who was overlooking the work of the agent Fellner, should have frankly told the agent that it was going too far to allow the priest to go to Philadelphia and attempt to entrap the pastor. Or, if the F.B.I. man had already directed Pelypenko to cooperate with Kunze, the work of the informer should have been thrown to one side and no prosecution of the pastor instituted. The F.B.I. man should have been told that the others would be prosecuted and that that should be enough.

Judge Hand notes the fact that Kunze paid Pelypenko $50.00 upon the promise that the latter would aid him in getting a passport (see pages 694-695 of the Opinion as printed in the Appendix to this brief). Judge Hand has no adverse comment to make on this swindling of Kunze by Pelypenko. Surely Pelypenko's act in taking the

money deserved further comment from the Court. The money was certainly paid Pelypenko, for Willumeit testified that he saw the money pass from Kunze to Pelypenko in a $50.00 note (pp. 622-623), and Judge Hand treats it as a proven fact. There was no contradiction of the testimony, and whether Pelypenko ever told the agents he had received the money does not appear. A making of money on the side by an informer may occasionally happen in cases where under-cover men are employed, but it is certainly unusual for an *agent provocateur* to get money from his dupe for the forwarding of a conspiracy. The fact that in this case the man so made money on the side shows how far the ordinary rules of honest dealing may be stretched if the courts are to allow such testimony to be used in this way in aid of criminal prosecutions.

THE FACTS AND THE LAW AS STATED IN SORRELLS V. UNITED STATES, 287 U. S. 435 (77 L. ED. 413).

The Court will remember the facts in Sorrells *v.* United States, 287 U. S. 435 (77 L. Ed. 413). It was a liquor case, the prosecution having been brought to punish a violation of the Volstead Act. The revenue agent had gone to the town where Sorrells lived, and by securing an introduction to him had spent a social evening with him at his house, and then lured him into selling him a bottle of liquor, the man not knowing that his caller was a revenue agent, but supposing him to be only a friendly visitor. Sorrells had had the reputation of being a rum runner, but there was no evidence that he had in his possession any liquor at the time, or that he was at the time a seller. He had even to send out to get the bottle of liquor which he sold the agent, although it was a fair inference that he knew where he might procure it. There was a conviction and sentence, and an appeal to the Court of Appeals for the Sixth Circuit. The latter court affirmed the sentence, but the Supreme Court granted a certiorari, and the case was fully argued by counsel for the appellant and the Government. The Supreme Court reversed the de-

cision of the Court of Appeals sustaining the sentence, Chief Justice Hughes writing the opinion of the Court and basing his conclusion on the theory that to justify the prosecution of a man under such circumstances would be to write something immoral into the Prohibition Law which Congress could not have intended. The Supreme Court, in accordance with the opinion expressed by the Chief Justice, reversed the judgment of the court below and sent the case back to the trial court for further proceedings. Mr. Justice McReynolds alone dissented. Mr. Justice Roberts wrote a separate opinion in which Mr. Justice Brandeis and the present Chief Justice concurred. He believed with Chief Justice Hughes that the judgment should be reversed but for a different reason. He held that "where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal. Equally true is this whether the offense is one of common law or merely a creature of statute. Public policy forbids such sacrifice of decency. The enforcement of this policy calls upon the court in every instance where alleged entrapment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administration of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require." Consequently, he and the two Justices who joined with him in his opinion agreed that the judgment should be reversed, but were of the opinion that the cause should be remanded to the district court with instructions to quash the indictment and discharge the defendant.

We have searched the more recent reports but cannot find that the conclusions reached in the Sorrells case have been in any way affected by subsequent decisions. The only reference that we have found to the case is in the dissenting opinion of Mr. Justice Murphy in Goldstein *v.*

U. S., 316 U. S. 114-129 (1942), but this case arose under the Federal Communications Act and Mr. Justice Roberts in stating the Court's opinion based his conclusions solely on the wording of the statute under discussion.

It is difficult to see why the decision in the Sorrells case should not be followed in the present case. There was the same intent to instigate the commission of a crime, and to instigate it by trickery. The Sorrells case was a prosecution under the Prohibition Act and the present proceeding is a prosecution for conspiracy to violate an act relating to our national defense, but the rules of criminal law and ethics apply equally to both prosecutions. One cannot logically condemn trickery in one case and uphold it in another. If the Court is to accept the reasoning of Chief Justice Hughes or the reasoning of Mr. Justice Roberts in the earlier case, the sentence should be reversed in the present proceeding. The only possible question is as to the facts. Do the facts in the present case fairly bring it within the scope of the earlier decision? We submit that they do.

As respects the question of whether the defendant was a law-abiding man when Pelypenko went to him, the facts are even stronger than they were in the Sorrells case when the prohibition agent went to Sorrells in order to entrap him. Molzahn was then a law-abiding man, unless the words attributed to him according to Pelypenko's testimony at the interview in May show that he was then and there violating the law under which he was indicted. In the Sorrells case there was the fact that the man had the reputation of being a rum seller. Molzahn had no reputation of being a Nazi sympathizer, let alone a traitor to his adopted country. There was a "luring" in one case and only a trap set in the other, into which, if the jury's verdict was right, Molzahn stepped, and so was guilty of entering into the conspiracy. The absence of "luring" in the present case made it only weaker from the standpoint of the Government. In the Sorrells case

the man had at least violated the letter of the law in selling the liquor. Molzahn had in no way violated the provisions of the Code. In each case the Government agent, to use the slang of the day, "went out to get" the man, and the act was as reprehensible in the one case as in the other. Consequently we contend that the judgment of the District Court in the present case in sentencing the defendant was contrary to public policy and should have been reversed by the Court of Appeals.

At the conclusion of all the evidence in the present case evidence for the Government in chief, the evidence for the defense and the evidence in rebuttal—the defendant's counsel moved for a directed verdict of not guilty (see pp. 662, 663). What was said by counsel at the time will be quoted later in the present brief. The Court was asked to allow an exception, and an exception was granted. The refusal of this motion is the subject of Assignment of Error No. 7.

The judge in his charge (pp. 664-666) failed properly to analyze the evidence. He did not call the attention of the jury to Kunze's testimony as respects the contents of his letter to Molzahn. This testimony was of prime importance for even if Molzahn had received the letter it would have told him nothing of the conspiracy. Surely this should have been pointed out. True, the jury might not have believed Kunze, but then there was an empty space—a vacuum—to be filled, and it had not been filled by Pelypenko's testimony. He had not told Molzahn of the conspiracy. There was no question as to the soundness of what the judge said to the jury, but it was inadequate under the circumstances. The trial had lasted four weeks, and the testimony on which the Government's case depended was not analyzed. The attention of the jury was not called to Kunze's testimony regarding the letter he had sent by mail to Molzahn. Even if Molzahn had received it, it would have told him nothing of the conspiracy. Surely

the Judge should have pointed this out. True, it was still a question for them, for they might not have believed Kunze, but then there was an empty space, a vacuum, to be filled, and it had not been filled by Pelypenko's testimony. He had not told Molzahn of the conspiracy.

The jury retired after the Judge completed his charge. This was at 3 P. M. on Friday, August 21st. At 4 P. M. they returned to the courtroom for further instructions by the Court, and at 5 P. M. they returned a verdict of guilty, having been out something less than three hours. Motions to enlarge the defendant and to set aside the verdict and grant a new trial were made by counsel. The first motion was refused, and the defendant was remanded to the custody of the Marshal. The Court set the following Tuesday, August 25th, for disposing of the new trial motion. After argument then made by counsel for the defense and the Government, the Court decided the matter, refusing the motion to set aside. The Court stated its opinion orally, as follows (pp. 678, 679):

> "Tuesday, August 25, 1942, Afternoon Session.
>
> THE COURT:—On the motion to set aside the verdict and for a new trial:
>
> The defendant in argument uses the analogy of a chain of evidence in which some of the links are missing. The links, consisting of evidence sufficient to go to the jury, have been produced in this case. The strength of the links is a matter for the jury to determine.
>
> The testimony of Pelypenko that the photographs of Kunze, taken with a purpose of obtaining travel documents, were left by him on two separate occasions at defendant's office, that later defendant told him that a letter from Kunze had been received and that defendant had done what he could, that defendant told Pelypenko defendant knew Kunze was going out of the country carrying important documents

would, if believed, supply the link which defendant apparently claims is missing.

The weight of evidence produced by the Government as well as that produced by the defendant including the character evidence was for the jury to determine. The jury has had an opportunity to observe the witnesses on the stand under direct and cross examination and to assess their credibility.

The motion to set aside the verdict and for a new trial is denied.

THE COURT:—Exception may be noted."

The refusal to grant the motion to set aside and for a new trial forms the subject of Assignment of Error No. 8. The case was one, we contend, in which the Judge should have exercised his discretion and granted a new trial.

POINT III.

The Defendant did not have a Fair Trial.

We have already alluded to the way in which the mind of the jury was poisoned during the trial by the introduction by the Government, in a garbled form, of the two letters written by Kunze and sent by him by mail from Mexico on December 8, 1941. We contended that the evil effect of this evidence was not corrected by anything which was said by the representatives of the Government or by the Judge. The speeches of counsel were not included in the record as it went to the Court of Appeals and we deemed it material that the Court of Appeals should see just what was said or left unsaid by counsel. We therefore in our Petition for a Rehearing requested the Court to allow us to add to the record what was said by counsel in their summing up speeches in reference to the exclusion of the postscript letter (Exhibit R), when it was introduced by the defense. We stated that we had in our possession the speeches in typewritten form as reported

by the stenographer and that we believed that they would demonstrate that the Government to the end of the trial used the "Ferdinand and Wolf" letter to show that Molzahn was guilty.

The Court of Appeals in denying our motion for a rehearing incidentally denied our request that the speeches be attached to the record.

From the first Molzahn was treated by the Government as a public enemy too dangerous to be accorded the rights of an American citizen. This was shown in the summoning of him to appear before the Grand Jury in Hartford before the indictment was found, and the fixing of security for his appearance at $25,000—a preposterously high figure considering he was a well known and highly respected minister living at home with his wife and family in Philadelphia. What chance there was of his running away it would have been hard to imagine, but he was forced, as he states in his petition, to an imprisonment of four days before the money was raised in cash by his friends and deposited with the Commissioner. Previously, and when he was still without counsel, the search of his house and the seizure of the exhibits used against him had taken place, and from that time on the things seized remained in the possession of the F.B.I. It is true that he had consented to the search and made no objection to the seizure of the books, photographs, and other articles that were taken out of his possession, but he was injured none the less by what was done. With the things taken from Molzahn's house were numerous other exhibits that had been taken from Vonsiatsky's residence in Connecticut and which did not involve Molzahn at all.

It is hard to give a picture of the court room with its crowd of interested spectators as the trial progressed from day to day, but the atmosphere was tense with war excitement. With hardly an exception the witnesses for the defense were assailed by the Government as if they had done something wrong in coming to Hartford. Every

opportunity was taken to prejudice the jury against them. Again and again the German birth of a witness or his descent from German ancestors—his natural love for the land of his birth or that of his forefathers—was held up before the jury as a reason for discrediting him. If the witness had been born in Germany and for some reason or other had not applied for citizenship promptly, his loyalty to the land of his adoption was questioned. If the man or woman had visited Germany, it was a reason for believing that the witness was in sympathy with the Nazi party and the Fuehrer. It mattered not that the witness had relations in Germany—parents, brothers and sisters—whom he wished to see. Or, if he had wished to inform himself as to developments in Germany, it was taken as a reason for assuming that he had an admiration for the Nazi government. And if by any chance, after the man's return to the United States, he had spoken of things to be commended in the German government, it was full proof that he was in sympathy with it. All this took place while the trial was progressing, and it must have prejudiced the jury's mind.

After a trial that had lasted for over three weeks and during which over fifty witnesses had been examined, the case was laid before the jury and they brought in a verdict in less than three hours' time. The charge of the judge covers twelve printed pages, and they could hardly have had time to consider his instructions. The evidence being what it was, it is impossible to see how the jury could have obeyed the Judge's directions to consider the testimony of both sides carefully, and bear in mind that the law presumes every man innocent until proved guilty, and that the proof in criminal cases must be beyond reasonable doubt.

A few months before the trial a startling revelation of what had been attempted by Germans and German-Americans in our midst to injure the United States—to make war on it secretly—had been published in the news-

papers. The F.B.I. had prosecuted ten men in New York under the same provisions of the Code that were invoked in the present case. The defendants had been convicted, and the story of the case, under the heading "The Case of the Ten Nazi Spies" had been written up by a man who sat upon the jury. This article had appeared in Harper's Monthly for the month of June. And more recently, there had been the dramatic arrest of saboteurs on the beaches of our Atlantic Coast—the men who had been brought across the Atlantic in German submarines and who had landed on our shores, fully equipped to do untold damage to our munitions plants, killing hundreds and perhaps thousands of our citizens. There was indeed a case of German espionage, proved beyond the possibility of a doubt, and carrying with it most serious implications. With such cases fresh in their minds, it was natural that the men and women on the jury would act with prejudice against a man of German birth. That they did this is clear from the verdict that was rendered.

CONCLUSION.

At the time of the trial the United States had been in the war something over six months. Now almost a year and a half has elapsed since the attack on Pearl Harbor. The ferver caused by the war—the war spirit during hostilities—is natural and cannot rightly be condemned. But it is something quite different for us to proceed against individual citizens in our midst because they happen to have been born in Germany. They have the right to the same even handed justice that is allowed to others living under our flag. And if an individual suffers because of his German birth and a verdict of guilty in a criminal case has been rendered against him through prejudice the injustice should be corrected and

the sentence, if the man has been sentenced, set aside. Otherwise in judicial proceedings we shall have a government by men and not a government by men under the law.

For these reasons we respectfully submit that the judgment of the Court of Appeals should be reversed, the sentence of the lower Court set aside, and the petitioner discharged.

Respectfully submitted,

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